DOCUMENT RESUME

ED 476 299 EA 032 518

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|---|---|
| AUTHOR | Belfield, Clive R.; Levin, Henry M. |
| TITLE | What Does the Supreme Court Ruling on Vouchers Mean for School Superintendents? |
| INSTITUTION | American Association of School Administrators, Arlington, VA.; Columbia Univ., New York, NY. National Center for the Study of Privatization in Education. |
| PUB DATE | 2002-12-00 |
| NOTE | 17p. |
| AVAILABLE FROM | Teachers College, Columbia University, 525 West 120th Street, New York, NY 10027-6696. Web site: http://www.ncspe.org. American Association of School Administrators, 1801 North Moore Street, Arlington, VA 22209-1813. Web site: http://www.aasa.org. |
| PUB TYPE | Opinion Papers (120) |
| EDRS PRICE | EDRS Price MF01/PC01 Plus Postage. |
| DESCRIPTORS | *Court Litigation; *Educational Vouchers; Elementary Secondary Education; Government School Relationship; *Politics of Education; Private Education; Private School Aid; Private Schools; Public Schools; *Superintendents |
| IDENTIFIERS | *Establishment Clause; *First Amendment |

ABSTRACT

In 2002 the U.S. Supreme Court approved educational vouchers, a method of public funding for education by providing parents with a certificate that can be used for paying tuition at a public or private school eligible to redeem vouchers. Interpretations of the decision were many and often caused confusion as proponents and opponents to vouchers offered opinions. The purpose of this paper is to provide a more balanced picture of the ramifications of the Supreme Court ruling. The paper begins with background information, including an explanation of the Cleveland Scholarship and Tutoring program, which the Court examined through the lens of the Establishment Clause of the First Amendment of the U.S. Constitution. The paper continues with suggestions to public-school superintendents on what to do in light of the ruling and states that: (1) educational voucher programs are unlikely to proliferate; (2) voucher reforms do not show evidence that they are a silver bullet for raising school performance; and (3) vouchers may leave those at the bottom worse off. The paper continues with suggestions on where and how superintendents can place their concerns. It concludes with opinions by the authors. (Contains 49 references.) (WFA)

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ED 476 299

# What Does the Supreme Court Ruling on Vouchers Mean for School Superintendents?

December 2002

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Produced in Conjunction With:

American Association of School Administrators

1801 N. Moore St.

Arlington, VA 22209-1813

www.aasa.org

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**BACKGROUND**

As the summer of 2002 began, school superintendents awakened to morning headlines that the U.S. Supreme Court had approved vouchers. Many wondered what would be the impacts of this Decision on their schools. Interpretations of the Decision were quick in coming and often misleading. Voucher advocates heralded the decision as an emancipation proclamation for parents with ramifications equal to the 1955 Brown desegregation decision. Opponents viewed the decision as a call for the demise of public schooling. The purpose of this advisory is to provide a more balanced picture on the ramifications of the Decision.

Educational vouchers represent a method of public funding for education by providing parents with a certificate that can be used for paying tuition at a school eligible to redeem vouchers, whether public or private. Eligibility of schools requires them to accept the procedures and regulations that are associated with the voucher plan. Different voucher plans have different regulatory requirements regarding such matters as testing and admissions criteria as well as different funding provisions. Although there are many different voucher plans, only Cleveland and Milwaukee and the State of Florida have actually implemented the approach with public funding. One reason that the Supreme Court's decision was confusing is that its interpretation by commentators extended far beyond the question which the Court addressed. The US Supreme Court was asked to determine if the Cleveland Scholarship and Tutoring Program (CSTP) violated the Establishment Clause of the First Amendment of the U.S. Constitution, that portion separating government from religion. Thus, it is important to acknowledge the specific features of that program.

The CSTP was established by the State of Ohio as a strategy to provide alternatives for students to what was considered a persistently, failing, school system in Cleveland. High dropout rates and low student achievement were rampant in the Cleveland schools. The CSTP provided vouchers to be used at private schools for a specified number of K-7 students in the Cleveland Municipal School District (which has 73,000 students in around 122 schools) as well as tutoring services for an equal number of students. For families with incomes no more than twice the poverty line ($35,330 for a family of four) a voucher was available for up to 90% of the tuition fees at a private

school (up to $2,250). For families with incomes more than twice the poverty line, a voucher was available for up to 75% of tuition fees (up to $1,875). Grants of $500 for public school tutoring were also available. Beginning in 1996 with 1,994 voucher students, the program had expanded to 3,406 students by 1999. In most of the years, almost all the students attended religious schools, virtually the only private schools with tuition levels in the range of the voucher allocations. In August 1999, the program was rejected by a federal district court ruling on the grounds that the program favors religion and therefore violates the First Amendment. In September, 2001, the Supreme Court agreed to review the constitutionality of the decision of the district court, as *Zelman et al. v. Simmons-Harris*.

In *Zelman et al. v. Simmons-Harris et al.* the Supreme Court faced a relatively narrow question: Does the CSTP violate the Establishment Clause of the Constitution? By a 5-4 majority the Justices concluded that the program "is a program of true private choice... neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district" (p.11). But, the 4 dissenting Justices emphasized the risk of "religiously based social conflict" (p.1), and Justice Stevens's dissent ends with: "Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy" (p. 3). As Aaron Pallas has noted, voucher programs like this "blow another hole in the myth of the common school" (www.tcrecord.org). But, if the common school is a myth, it may be more realistic to claim, as Justice Thomas did, that "many blacks now support school choice programs because they provide the greatest educational opportunities for their children in struggling communities." A voucher program for at least some disadvantaged youth may be fairer than clinging to a century-old myth.

In weighing 'freedom of choice' with 'social justice and order', the Supreme Court ruled that the program does not offend the Establishment Clause. We ask two questions about this ruling for school superintendents:

*(1) What should a superintendent do in the light of the ruling? Are vouchers likely to be a popular strategy on the basis of strong evidence of educational effectiveness as its advocates claim?* Bluntly, our answer is 'Probably not'.

*(2) Will school superintendents expect to feel political pressures for voucher programs?* Here, we answer 'It depends where you live' and how well your schools are doing.

**WHAT SHOULD A SUPERINTENDENT DO IN LIGHT OF THE RULING?**

Superintendents need to focus on success, that is improving the educational performance of their schools and students. Especially for students from poverty, minority, and immigrant backgrounds, this means raising the educational performance of students through better teachers and teaching, effective pre-school programs, and strong educational support services for students and families. These goals have not changed, and it may become more important to show educational success on them as an alternative to voucher considerations. At the same time it is important to consider whether vouchers are an attractive alternative to existing public schools in the many situations represented by U.S. public schools. In general, the answer is no for three reasons.

First, educational voucher programs are unlikely to proliferate; second, voucher reforms do not show evidence that they are the silver bullet for raising school performance; third, vouchers may leave those at the bottom worse off.

Vouchers are unlikely to proliferate

-- *The Supreme Court ruling only tells us what we can do, not what we should do.* Even as the Supreme Court gives the go-ahead to the Cleveland program, this is not a *carte blanche* for voucher programs in other states. This ruling only states what is permissible; it does not say what is desirable. In fact, court rulings may be weak at effecting change: they do not have 'power of the sword' (to force voucher programs into school systems) nor the 'power of the purse' (to pay for voucher programs). This case is not another *Brown vs. Board of Education*: it allows vouchers, rather than mandates them. Also, the Supreme Court only tells us what is permissible under the Federal Constitution; there are state proscriptions on funding to private schools or to religious entities. In his most recent paper, University of North Texas Law Professor Frank Kemerer (2002) finds that only 19 states have constitutions that would follow the Supreme Court ruling. Another 15 states have constitutions that place heavy restrictions

on voucher programs. The other 26 states could go either way. So, in many states, there is still a strong legal obstacle in front of vouchers.

-- *Families are not especially strong supporters of voucher programs.*

Stanford Professor Terry Moe's (2001) survey data clearly show that the general public favors *public* schooling. Two-thirds of parents respond "yes" to "public schools deserve our support, even when they are performing poorly." So, there is a strong belief in the public school system, without resorting to private options. Of course, parents are concerned about school effectiveness and want good schools. But, the evidence on the effectiveness of educational vouchers from two cities and three experiments does not show extraordinary promise. Also, some parents would face big asset losses: voucher programs would break the link between house prices and school quality, so parents who paid high prices to live near good schools would be clearly opposed. These parents would suffer big losses in the value of their most important asset, their home. As well, voucher programs are complicated with considerable complexity in their details, even though the general concept of expanding choice may seem simple enough. Public understanding of vouchers is spotty, and the public tends to be wary of replacing the familiar with the unfamiliar or the highly complex. So, ideology, inertia, threats to home prices, and incomprehension all suggest parental support for voucher programs will not be high.

-- *Private schools are not that enthusiastic about vouchers.*

Vouchers are supposed to encourage new suppliers of education. But, there is no evidence of large pent-up supply of private schools waiting to enter the market. Schooling is a micro-industry: small schools and small organizations often work best. Enrollment growth in existing private schools or through franchising is unlikely to be very profitable (Andrews et al., 2002). Religious schools will be sensitive about enrolling students who are imperfectly devout – this could 'water down' their religious instruction (on the growth of non-religious students in urban Catholic schools, see Sander, 2001). Independent schools will be sensitive to the perceived loss of selectivity from enrolling voucher students. Generally, existing private schools will be wary of taking government funds because of the fear of government regulation and oversight (Encarnation, 1983), a fear reflected in a 1998 survey by the U.S. Department of

Education. In law, if not in practice, the government has substantial discretion over how private schools are run, and this law is likely to encroach further if private schools accept voucher-funded students (Sugarman & Kemerer, 1999). In Milwaukee, for example, private schools that participated in the voucher program would not accept student testing programs that would allow direct comparisons of student achievement between schools. But the Cleveland plan that passed muster with the U.S. Supreme Court requires such testing. For all these reasons – size, mission, selectivity, and 'regulation creep' – a sizeable proportion of private schools are likely to reject voucher students.

*-- Voucher programs may be hindered by the 'No Child Left Behind' Act.*

The 'No Child Left Behind' Act of 2001 emphasizes school choice, and vouchers could clearly fit into a 'school choice agenda'. But, the Act enhances public school choice rather than private school choice. The legislation does authorize $100 million for fiscal years FY02-FY07 for school choice programs. It also maintains capital financing support for charter schools; and these schools are in competition with private schools. And it promotes 'safe school' choice, for students to move from dangerous public schools to safer ones. Much of the 'school choice' agenda will involve public school programs, not private schools. However, if a school is "failing" after three years, its students are eligible for supplemental education services from public or private providers. These can include tutoring or private school tuition among other alternatives.

Furthermore, the legislation mandates more accountability, such as tests for Adequate Yearly Progress. Private schools may resist giving these tests to their students – they may say they are too expensive to administer. But, if private schools are using publicly-funded vouchers, then they will be under strong pressure to prove they are making Adequate Yearly Progress.

*-- Freedom of choice – one rationale for vouchers – undermines the publicness of public schools.*

Public schools are intended to promote public ends – that is why they are funded by the taxpayer. Public schools provide a 'common experience' that is shared by many and forms a part of the social contract between the generations and across social groups. Public schools produce civic socialization to bind communities together. There is substantial evidence that the quality of student peers has an impact on the achievement of

other students, so further stratification of students by race and social class needs to be avoided. (Zimmer & Toma 2000; Hanushek, Kain, Markman, & Rivkin 2001). Moreover, where public needs are greater, the need for public schools will be stronger. In threatening times, public needs loom large. The recent rise of terrorism and the need for national identity and discourse represent a time for public action. A system of choice among schools that are largely independent may undermine this common quest.

*-- Voucher reforms are no longer the policy favorite of many on the political right.*

Rightwing groups favor reforms that streamline government and privatize social programs. Vouchers are one way to do that in education. But there are two alternatives: home-schooling and tuition tax credits – both are recent reforms, both are growing rapidly, and both dwarf voucher programs. Home schooling and tax credits are ways to privatize social programs in ways that do not involve vouchers. For someone who really wants to privatize education, these may be the policies to promote.

Home-schooling is the ultimate in privatization. It is privately funded (by parents), (very) privately provided, and (almost completely) privately regulated. It has only been legalized within the last two decades (Somerville, 2001), but already home-schooling has grown from around 400,000 students in 1994 to around 800,000 by 1999 (Bauman, 2002; Welner and Welner, 1999). These figures show how popular and widespread home-schooling now is. There are some legal and regulatory constraints on home-schooling, but these could be weakened. If home-schooling gained in legitimacy, then privatization advocates – and many rightwing groups – would be pleased, with or without vouchers.

Tuition tax credit reform looks equally enticing. Such credits allow parents and businesses to claim against their tax bills for any spending on private schools. As of Summer 2002, six US states have tuition tax credit laws, and an additional ten are considering their introduction. So far, the amounts are small (less than $1,000 credits), but eligibility is broad. In all cases, the credits reduce government revenues, and mainly subsidize students who currently attend private schools rather than inducing new private enrollments (Belfield and Levin, 2002). Such tax credits are much less likely to face legal challenges, making them easier to implement and reducing educational oversight by government under what is viewed as a tax transaction rather than an educational one.

Together, home-schooling and tuition tax credits offer powerful alternatives to vouchers for conservatives.

-- *Voucher advocates are divided on objectives.*

There are now two groups of voucher adherents: 'pro-poor advocates' and the universalists. The universalists want vouchers for everyone, even those high-income families whose children already attend private schools. Only then will the full force of the market be felt, and the entire population be given freedom of choice in schooling. But the pro-poor advocates want targeted vouchers, only available for low-income families in poorly performing school districts. Vouchers would offer the students in these schools an escape hatch and allow them to experience higher quality educational services. Unlike the universalists, the pro-poor advocates do not want vouchers for everyone. So, there is a political split in voucher ranks, particularly when new voucher arrangements are proposed where eligibility is not only for the poor. It is now apparent that many who support vouchers for inner-city populations see this only as the first step in legitimating voucher strategies for all students. Pro-poor advocates will resist this type of expansion.

In summary, we can think of seven reasons why voucher programs are unlikely to blossom in many U.S. cities.

We now turn to the effects of vouchers on what schools do, and how effective they can be. Here, our findings are a bit dispiriting.

Vouchers are not likely to have a strong impact on school performance

-- *Many parents already have the choices that vouchers are supposed to bring.*

Even if there are voucher programs, the improvement in educational standards is unlikely to be great. Typically, voucher advocates emphasize the freedom of choice and efficiency gains that come with vouchers. Freedom of choice may increase parents' satisfaction with their schools (Peterson & Hassel, 1998; Greene, 1998). But, many parents already have choices – they can choose their school, their district, magnet schools and charter schools or whether to go into the private sector (Henig, 1994). Adding one more option will not make much difference for perhaps 60-70 percent of the population. This large majority already has plenty of choice.

-- *Voucher programs do not show big effectiveness gains.*

The evidence from randomized field trials of vouchers show that test score gains from vouchers are weak or non-existent in comparison with similar students in public schools (Howell and Peterson, 2000). After three years of using a voucher in three different cities, there were no differences in achievement between voucher students and those in public schools. Only African American students with vouchers in one of the cities posted test scores higher than similar students without vouchers, and even that finding has been challenged by a reanalysis of the data. There is reason to believe that any gains reported in these trials overstate the advantages of vouchers. Many students who initially take up vouchers drop out of the program later on, suggesting a lack of long-term benefits. Overall, the test scores gains from vouchers are small, even when one accepts the data of their leading advocates.

-- *Voucher programs do not show big efficiency gains.*

Perhaps vouchers are more efficient than the current public school system? Efficiency gains might arise if there is more competition between schools, or better management and faster innovation in the voucher schools. Here, too, we find no compelling support for vouchers. In general, competition probably produces some efficiency gains, although these are modest; and a small voucher program will not generate that much competition. Better management is harder to identify: charter schools appear no more efficient than public schools (see Miron & Nelson, 2002; Peterson & Campbell, 2001); for-profit schools are currently experiencing substantial financial difficulties; and although private religious schools do seem to improve graduation rates, their test scores are only marginally higher than public schools (see Figlio & Stone, 1999; Neal, 1997). Efficiency gains through innovation are also not evident: present for-profit educational management organizations use traditional pedagogies based largely on readily available commercial curriculum materials (Levin, 2002). These organizations generally follow traditions and standard technologies, rather than innovate.

<u>Vouchers may make those at the bottom worse off</u>

-- *Voucher programs benefit the most- educated families.*

Currently, high income families have choices, and many families have good schools nearby. However, some families do not and it may be legitimate to offer them

more choices. But, if the subset of these families who take up a voucher are more highly educated than the students whom they leave 'behind', there will be an increase in the concentration of the most disadvantaged at the original school site. In his analysis of the Milwaukee voucher program, Witte (1999) found that relatively highly educated families took up the vouchers to exit their public schools. Offering vouchers will allow some students to 'escape', but may disadvantage those who cannot escape. 'Escape' may also lead to greater racial segregation – when there are more choices, families tend to cluster within their races (as is found by Reardon and Yun (2001) and by Betts and Fairlie (2001), for example). There are solutions to this problem of 'flight and polarization' (e.g. giving more funds to the public school students 'left behind'), but these solutions may take time to put in place.

For three reasons, then, voucher programs are not a 'silver bullet' – only a minority of families may need them, their gains will not be big, and the savings in efficiency will be small if any. As well, gains for some may mean losses for others, particularly the most disadvantaged with the least choice. This does not mean that vouchers should be rejected out of hand, but we should be realistic about what can be expected from them. As a solution to failing schools, the evidence on vouchers needs to be weighed against the evidence from other alternatives such as recruitment of better teachers, improved school leadership, smaller classes, enriched pre-school experiences, and a variety of incentive programs for public schools.

**WHERE SHOULD SUPERINTENDENTS PLACE THEIR CONCERNS?**

If voucher programs are unlikely to proliferate, and their effects are modest anyway, should superintendents really be concerned? That depends on where you live. The attractiveness of vouchers will increase depending upon how well local schools are functioning. Powerful strategies to improve public education, especially for students in at-risk situations such as the poor, minorities, and immigrants, are the best alternatives to voucher initiatives. Vouchers are simply one more alternative that may or may not be effective. Clearly the popularity of such an alternative to the electorate will depend upon how well schools are functioning in their jurisdiction.

Undoubtedly, the Supreme Court decision gave a boost to voucher advocates by permitting public funding to be used for religious schools. Voucher programs vary significantly – the Florida program is different from the Milwaukee voucher program, and different again from the Cleveland program. It's hard to sell such a complicated policy where the devil is in the details. That is why voucher supporters are a disparate collection of academics, advocacy groups, fiscal conservatives, and community groups – each with their own blueprint for the best voucher program. 'Vouchers' attract a lot of attention, but many groups have different motives and agendas about what a voucher should entail.

But now, with more clarity as to a workable voucher program, and a specific template to work with, the voucher movement may grow and perhaps even come together. Parents – previously uncertain about what a voucher program was – may come off the sidelines. Pressures for vouchers could grow in many districts.

But voucher advocates are likely to think strategically. And here is a possible strategy. Find a few districts or pockets within districts, probably in inner-cities, where both test scores and parent satisfaction are low. Or find a few districts where the regulations about school choice appear arbitrary or unfair. Make sure these are in states where the law is voucher-friendly and where there are some willing private schools. Present the evidence – vouchers help low-income families, especially African Americans – to grass-roots groups, and get their help in mobilizing political and community support. This might be a workable strategy in some districts. But only in a few.

So, the Institute for Justice is launching a "nationwide school choice offensive", beginning with a court case in Maine. Their website (www.ij.org) promises that "The Maine case will be followed by lawsuits challenging state constitutional religion clauses that could be interpreted to exclude religious options from school choice programs in other states." Over the coming months, then, court cases are likely in Vermont, Colorado and Washington state. These cases may lead to education reforms that encourage vouchers.

## CONCLUSION

There are no quick fixes to improving America's schools, and there are no easy choices. In these two respects, certainly, education vouchers fit right in.

In emphasizing freedom of choice, the Supreme Court has clearly given support to a particular strand of reform that comes under the banner of education privatization. In this case, what is being made private is the decision that a parent will make about the education that he or she wants for their children. What is being lost to the public, then, is the ability to influence that decision for the social good. However, the numbers of parents involved may be small and are likely to remain so. In the grand scheme of things, the substantive effect on educational reform will be modest, although it is likely that the political and ideological debates will increase in fervor as a result of the Supreme Court opinion. Nonetheless, the ideas of choice, efficiency, equity, and social cohesion – as well as the notion of a trade-off among them – remain fundamental to our understanding of the impact of voucher reform. Such ideas are likely to be increasingly important if the ideological debates heat up.

Undoubtedly, the ruling will please voucher advocates. It stresses the advantages of choice and the fairness of education vouchers. It corresponds well with advocates' new, focused agenda: targeted voucher programs, especially for low-income families in inner-cities. And, it clarifies a debate where beforehand uncertainty had scared away supporters. At issue for the future is whether these factors are sufficient to tip the balance in favor of more programs and which cities these programs might be in. But in omitting a concern for *public* schooling, the ruling also ignores one of the most fundamental arguments for government-support for education in a democratic society. What binds us to the commonwealth is what we share in terms of civic participation in democratic institutions. These require a common set of values and understanding and a toleration for different points of view. They require knowledge of the political and economic institutions that are the bedrock of our society and how all citizens have rights under those institutions. They require experience at discourse when controversy prevails and agreement on a set or procedures for resolving controversy. These needs are heightened in an age of vast immigration and expanding inequalities that serve to separate the

population by race, language, housing, and economic circumstances. Voucher plans that do not address this issue may create a future capacity for greater divisiveness.

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